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No. 89-999

In The

Supreme Court of the United States

October Term, 1989

MARION TERWILLIGER,

Petitioner.

v.

GREYHOUND LINES, INC., a foreign corporation and JAMES SELBY, jointly and severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

– AND APPENDIX –

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S STATE LAW CLAIM OF FRAUD AGAINST THE RESPONDENTS WAS PREEMPTED BY § 301 OF THE LABOR-MANAGEMENT RELATIONS ACT, 29 U.S.C. 185; WHEN SAID SUIT WAS INEXTRICABLY INTERTWINED WITH THE COLLECTIVE BARGAINING AGREEMENT?

II.

WHETHER PETITIONER'S CAUSE OF ACTION WAS BARRED BY HIS FAILURE TO INITIATE AND EXHAUST ALL AVAILABLE REMEDIES PURSUANT TO THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT?

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RESPONSE TO PETITION FOR CERTIORARI

Respondents, GREYHOUND LINES, INC., and JAMES SELBY, request that this Honorable Court deny Petitioner's, MARION TERWILLIGER, Request for a Writ of Certiorari to review the Opinion of the Sixth Circuit Court of Appeals on August 10, 1989, which reversed a jury verdict entered in this matter; finding the Petitioner's state-law claim was preempted by § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185; and on the basis of Petitioner's failure to exhaust the remedies available in the Collective Bargaining Agreement. The Sixth Circuit did not rule on the other seven issues raised by Respondents, since the two rulings made by the Court had disposed of this case. The Respondents herein received Petitioner's Petition for Writ of Certiorari on December 27, 1989.

COUNTER-STATEMENT OF THE CASE

Petitioner's Statement of the Case contains irrelevant, immaterial and, more importantly, unsupported factual assertions. It omits significant relevant material established at trial. In essence, it is a misrepresentation to this Honorable Court.

Petitioner claims GREYHOUND altered documents, withheld information, and made misrepresentations concerning the Petitioner's medical condition. The testimony and documentary evidence produced at trial clearly established there was no evidence presented that GREYHOUND or its employees altered *any* documents. Nor was there any evidence that GREYHOUND intentionally withheld; nor was there a requirement to furnish the second medical report of Dr. Kantor; outside the contractual provisions of Section N, Article 2(m). Petitioner has deliberately misstated facts apparently to mislead this Court.

Petitioner was hired by GREYHOUND on February 12, 1943, as a bus driver transporting passengers, baggage and package express in interstate commerce. He was a member of Local 1301 of the Amalgamated Transit Union (hereinafter referred to as "Union"), and was subject to the provisions of a Collective Bargaining Agreement between the National Counsel Greyhound Divisions Amalgamated Transit Union AFL-CIO CLC and GREYHOUND.

In 1959, Plaintiff went on medical leave after he experienced faintness, blurred vision and chest pressure while driving a GREYHOUND bus from Bay City to Detroit. Petitioner was hospitalized at Bay City General Hospital, for nine days. Three doctors diagnosed Plaintiff as having (1) angina pectoris; (2) coronary artery atherosclerosis; and (3) "questionable myocardial infarc-

tion." An electrocardiographic study revealed a coronary artery sclerosis with angina pectoris. He was re-hospitalized and diagnosed as having Wolf-Parkinson-White Syndrome and Dr. Rueter stated that to continue to allow Petitioner to drive "could only be interpreted as an act of negligence."

Petitioner was reluctant to accept this diagnosis and disqualification decision and when Dr. Rueter would not discharge him from the hospital, he discharged himself. He was on medical leave for 18 months until 1960 and returned to work after submitting a medical report from his physician and passing a medical exam requested by GREYHOUND. He was examined by eight doctors regarding his heart problems during the 18 months he was off work. Despite being on a medical leave of absence from GREYHOUND, Petitioner worked for a freight hauling company but did not reapply to GREYHOUND for employment prior to August, 1960.

Petitioner knew GREYHOUND's requirements exceeded those of the Department of Transportation (hereinafter referred to as "DOT") and that GREYHOUND would not accept only a DOT physical as qualifying him to drive a bus. In 1966, he experienced a burning sensation in his chest, after lifting dies weighing 75-100 pounds, as part of his bus driving job. He began treatment with Dr. Kondomerkos and was re-hospitalized for approximately three weeks for heart trouble. On July 15, 1966, Petitioner was disqualified by his doctor from his employment, as a bus driver, when he was diagnosed as having coronary artery disease. He then applied for, and was granted, disability pension status, pursuant to his rights under the Collective Bargaining Agreement. Petitioner remained on disability status from 1966 until his normal retirement age, on December 1, 1983, and continues to collect a pension.

He also collects, since 1968, a V.A. pension for his psychiatric disability.

Petitioner was disqualified from working for GREYHOUND from 1966 through 1971 by his own personal doctor, Dr. Kondomerkos; because of the abnormal readings on the Petitioner's EKG's. During these five years Petitioner did not seek reinstatement to drive for GREYHOUND. Other than Dr. Kondomerkos' report in 1971, Petitioner never supplied Respondents with any information concerning other medical records and examinations made between 1959 and 1971. Moreover, Petitioner was given a physical examination in November of 1970, by a doctor for Shortway Bus Lines and did not supply that information to GREYHOUND. Although Petitioner drove a transit run for Shortway, he felt he would have a hard time returning to work over-the-road for GREYHOUND because he assumed GREYHOUND would want more EKG's.

While he was being treated for heart problems, he was also going to the V.A. Hospital regularly for psychiatric care. In 1967 Petitioner was placed on disability status by the V.A. GREYHOUND was *never* informed of this disability determination.

All of the EKG's done by his treating physician, Dr. Kondemerkos, from 1966-1971, were *abnormal*. Petitioner originally testified he had no chest pains from 1966 until the present, but, he later admitted that was not true. In 1972, the V.A. Hospital records revealed Petitioner had angina pectoris attacks and was hospitalized from April 30, 1972 to May 6, 1972. At that time he was diagnosed, by Dr. Dryer, as having myocardial ischemia and was hospitalized at Annapolis Hospital.

Unknown to GREYHOUND, January 4, 1978 medical records revealed he, in fact, had chest pains over the past eight years, from 1970 through 1978. The medical

reports reflected Petitioner had medical problems "consistent with aortic valve disease." He never disclosed any of this information to GREYHOUND.

After he engaged in a heated outburst at Dr. Kondemerkos' office, accusing the doctor of "milking the insurance company"; Petitioner *then* received a letter from the doctor saying he could return to work. Dr. Kondemerkos' letter of April 13, 1971 did not contain the required information specified in the Safety Bulletin described below. Subsequent to April 13, 1971, he requested reinstatement to his employment with GREYHOUND, as a bus driver.

On March 14, 1971, GREYHOUND's Safety Department re-issued a Bulletin specifying the conditions for an employee to return to work after disqualification based on a heart condition. (Appendix, p. A-1, *infra*). SELBY's conduct was in accord with the Bulletin.

At the time Petitioner requested reinstatement, J. Underwood, GREYHOUND's Assistant Regional Manager, sent him to Maybury Grand Clinic. On July 28, 1971, Petitioner was examined by Dr. Kantor, an internist at the Clinic. After the examination, Petitioner *had not* received a clearance to return to work.

Petitioner saw Dr. Kantor's report when the doctor gave it to him following the examination. The report contained two items of disqualification, showing the DOT regulation numbers. However, *Petitioner was orally told by Dr. Kantor that the only reason he was disqualified was because of his vision.* The conversation between Dr. Kantor and Petitioner was prior to any knowledge by GREYHOUND of Dr. Kantor's report.

On September 20, 1971, Petitioner wrote a letter to the Union "to lay a foundation for [his] case." He stated he talked to Dr. Kantor and saw the results of the

physical. He wrote the letter in case the matter was pursued with GREYHOUND.

His letter to the Union contained a statement that he saw the results of the physical, and was turned down only for his glasses. Petitioner wrote that *he knew* he had passed Dr. Kantor's physical and should have been back to work on July 28, 1971. His letter further stated: "I firmly believe that intentionally or unintentionally there has been an error in judgment or possibly a misinterpretation of the contract." On September 20, 1971, he advised the Union he believed GREYHOUND was acting improperly. Petitioner had filed grievances in the past and knew how the grievance procedure worked; yet he never pursued a grievance when his reinstatement request was denied.

Upon Respondent SELBY's return from vacation, in August, 1971, he noticed there were two reasons why Petitioner had not been certified to return to work: one for glasses and the other for a heart condition. However, the DOT number for the heart condition was *transposed* and SELBY requested clarification from Dr. Kantor. The Union *also* recognized the DOT number was incorrect and wrote a letter to Dr. Kantor asking for clarification; but never pursued their inquiry of Dr. Kantor any further.

Dr. Kantor sent a second report to GREYHOUND clarifying that he had disqualified Petitioner from returning to work only due to Petitioner's vision, but that Petitioner could be disqualified based on GREYHOUND's policy concerning heart conditions. On August 26, 1971, SELBY, who was located in Detroit, had *no authority* to reinstate Petitioner, and sought direction from a supervisor, JORGENSEN, in Chicago. JORGENSEN told SELBY to have Petitioner examined by a heart specialist due to Petitioner's past history of

heart trouble. As mentioned earlier, in 1959, GREYHOUND had been informed by Dr. Rueter that it would be negligent for GREYHOUND to continue to allow Petitioner to operate a bus due to Petitioner's heart condition. Dr. Rueter had also advised GREYHOUND that Petitioner was prone to further attacks. Moreover, *based on the Safety Bulletin 3-71, SELBY determined Petitioner should not have been sent to Dr. Kantor, an internist, but should have been sent to a heart specialist.*

On August 24, 1971, *the Union asked* JORGENSEN to send Petitioner to a third doctor for the purpose of determining Petitioner's eligibility to return to work. Said request was made pursuant to provisions for medical arbitration in the Collective Bargaining Agreement. On August 30, 1971, JORGENSEN confirmed that Petitioner would be sent for a physical examination, by a cardiologist at Henry Ford Hospital, as requested by the Union. Thereafter, SELBY received instructions from W.D. Weiss, Director of Safety for GREYHOUND, to have Petitioner examined by Dr. Breneman, a Cardiologist, at Henry Ford Hospital. On September 24, 1971, Petitioner was examined by Dr. Breneman.

On September 30, 1971, Dr. Breneman issued his report in which he advised the parties that Plaintiff had "significant coronary artery disease" and "should not be employed in the operation of a commercial or passenger-transport vehicle." Based on the report of the heart specialist, Petitioner was not reinstated to work at GREYHOUND. The Union did not question Dr. Breneman's integrity or qualifications. Petitioner acknowledged GREYHOUND wanted to be sure that everything was alright, and that he was being sent to a heart specialist "to be sure." He admitted *he did not pass the physical examination by the heart specialist.*

Petitioner alleged the EKG done at Henry Ford Hospital "was screwed up" by the technician. However, even though Petitioner had taken 15 prior EKG's he did not tell the examining heart specialist or GREYHOUND about his concern. Petitioner believed the EKG was done incorrectly because he had keys, change, and metal in his possession. Despite his reservations, Petitioner did not remove the metal. However, Petitioner admits he did not know whether the EKG was done incorrectly and no evidence was presented showing it was done incorrectly. Either on the same day or the next day, Petitioner wrote a second letter to the Union regarding his examination at Henry Ford Hospital. He stated he knew, on July 28, 1971, that he had passed the examination with Dr. Kantor except for his right eye. Petitioner in his second letter to the Union, stated he had more information "than I care to divulge and . . . I'll do something about it." Petitioner never visited the Union office on this matter.

Instead of pursuing his grievance and arbitration remedies as provided in his Collective Bargaining Agreement, in 1971, he waited two years, until the Fall of 1973, before hiring attorney Richard Ashare to initiate a lawsuit against GREYHOUND and the Union. *Petitioner testified he agreed to wait several years before filing suit, so his compensatory damages would increase.*

Seven years later, in 1980, Ashare informed him that the statute of limitations had run on his claims against GREYHOUND and the Union; and the file had been destroyed. He then filed a legal malpractice suit against Ashare and settled his claim in July, 1985.

After Petitioner was disqualified by GREYHOUND in 1971 from returning to work, he could have requested another doctor and provide GREYHOUND with additional information, and the procedure would have

started all over again. This was provided for in the Collective Bargaining Agreement, under Article 12. Plaintiff made no such request from 1971 through 1981. On January 31, 1981, Petitioner again sought reinstatement; but GREYHOUND never decided the issue because he refused to provide GREYHOUND with updated medical reports on his current medical condition. When Petitioner requested reinstatement in 1981, he never informed GREYHOUND that he experienced heart problems after 1971. Finally, on November 25, 1981, he underwent a heart catherization which revealed a 61% obstruction to the heart's right coronary artery. Petitioner filed suit fourteen (14) years after he was denied reinstatement in 1971.

Many facts set forth in the Petitioner's Petition for Writ of Certiorari *are not* supported by the undisputed testimony and documentary evidence presented at trial. However, the Counter-Statement of Facts set forth herein *is* completely supported by the undisputed testimony and documentary evidence produced at trial and was taken from the Brief to the Sixth Circuit.

SUMMARY OF ARGUMENT

Throughout the course of this litigation, Petitioner has sought to enforce employment rights *created solely by his Collective Bargaining Agreement* with the Respondent. Further, any relationship between the Petitioner, as an employee, and the Respondents, as an employer or representative of same, clearly were solely created by, and exclusively stem from, the provisions of the Collective Bargaining Agreement.

In *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. 399; 108 S.Ct. 1877; 100 L.Ed.2d 519 (1988), this Honorable Court clearly stated state-law actions inextricably

intertwined with the provisions of a Collective Bargaining Agreement are preempted by § 301 of the Labor-Management Relations Act.

The Sixth Circuit is not in conflict, but in complete accord with *Lingle*. Petitioner has presented nothing pursuant to U.S. Sup. Ct. Rule 17 to warrant the granting of said Petition.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S STATE LAW CLAIM OF FRAUD AGAINST THE RESPONDENTS WAS PREEMPTED BY § 301 OF THE LABOR-MANAGEMENT RELATIONS ACT, 29 U.S.C. 185; WHEN SAID SUIT WAS INEXTRICABLY INTERTWINED WITH THE COLLECTIVE BARGAINING AGREEMENT.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In *Lingle* v. *Norge Division of Magic Chief, Inc.*, *supra*, this Honorable Court unanimously held that an application of state law is pre-empted by § 301 of the Labor-Management Relations Act of 1947; if such appli-

cation requires the interpretation of a collective-bargaining agreement. In so holding, the Court stated:

> Today's decision should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm: judges can determine questions of state law involving labor-management relations *only if such questions do not require construing collective-bargaining agreements.* (Emphasis added).

Petitioner contends the Sixth Circuit erred in holding Petitioner's fraud claim was preempted. Petitioner contends GREYHOUND fraudulently altered and withheld certain medical records relating to Petitioner's heart. It cannot be emphasized strongly enough that there is absolutely no trial transcript testimony and/or documentation to support this erroneous statement.

Petitioner contends that the Sixth Circuit failed to recognize that any grievance filed by the Petitioner in 1971 would have been decided pursuant to fraudulent records; and any grievance decided in 1985, after the alleged fraud was discovered, would not have been able to compensate him for the full range of injuries he suffered. Petitioner contends the alleged fraud cannot be remedied pursuant to a grievance procedure. Petitioner's assertions are completely unsupported by the record and have no basis in law.

In the instant case, Petitioner sought reinstatement to his employment as a bus driver with GREYHOUND pursuant to the terms of a Collective Bargaining Agreement. Here, contrary to the facts in *Lingle*, Petitioner sought to enforce rights that were *only* created by the Collective Bargaining Agreement. Further, Petitioner contends that GREYHOUND failed to live up to its duties under the Collective Bargaining Agreement when

it allegedly committed fraud through an alleged failure to disclose certain medical documents; forcing the Petitioner to undergo a third examination. Said examination was provided for under the Collective Bargaining Agreement. Further said examination was requested by the Petitioner's Union. These two factors in and of themselves establish that the provisions of the Collective Bargaining Agreement, governing the Petitioner's right to reinstatement, would have to be interpreted; and therefore, were inextricably intertwined with the Collective Bargaining Agreement. Clearly, § 301 was intended to preempt such disputes arising between the employer and employee governed by a collective governing agreement. Further, Petitioner's counsel admitted at the Sixth Circuit that this was a § 301 action.

Unlike *Lingle*, the rights which the Petitioner believes he has been denied stem from the Collective Bargaining Agreement itself. In *Lingle*, plaintiff attempted to assert and enforce rights created purely by state statute which prohibited retaliatory discharge when a person filed for and collected worker's compensation. In *Lingle*, this was a non-negotiable state statutory right separate and apart from any rights and/or duties the plaintiff may have had in his collective bargaining agreement. In the case at hand, Petitioner's right to reinstatement, as well as any relationship between the Petitioner and the Respondents, arose *solely* from the terms and provisions of the Collective Bargaining Agreement.

In fact, the holding in *Lingle* clearly recognized such a situation when it stated:

> Petitioner points to the fact that the Illinois right to be free from retaliatory discharge is non-negotiable and applies to unionized and non-

> unionized workers alike. While it may be true that most state laws that are not pre-empted by section 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition insures nonpre-emption. *It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by section 301. Similarly, if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be pre-empted.* (Emphasis added).

Thus, it is clear that Petitioner's state-law fraud claim was preempted by § 301; when in fact, the Court was called upon to interpret provisions of the Collective Bargaining Agreement. In fact, the jury was instructed by the Court, to interpret the Collective Bargaining Agreement relative to whether the Plaintiff was obligated to file a grievance. For the Court to have given such an instruction clearly establishes that interpretation of the Collective Bargaining Agreement was inextricably intertwined with the Petitioner's state-law fraud claim.

Unquestionably, where an employee's claim against either the employer or its agent, or both involves provisions of the Collective Bargaining Agreement, with respect to such matters as seniority rights, transfer, *medical disqualifications* and employment physicals, or other terms and conditions of employment, the action is within the ambit of § 301 and not state law. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202; 105 S.Ct. 1904; 85 L.Ed.2d 206 (1985); *Moore* v. *General Motors*

Corp., 739 F.2d 311 (9th Cir. 1984); *Strachan* v. *Union Oil Co.*, 768 F.2d 703 (5th Cir. 1983).

In *Allis-Chalmers Corp., supra*, this Honorable Court reasoned:

> If the policies that animate Section 301 are to be given their proper range, however, the pre-emptive affect of Section 301 must extend beyond suits alleging contract violations. These policies require that "the relationships created by [a collective bargaining] agreement be defined by application of an evolving federal common law grounded in national labor policy". *Bowen* v. *United States Postal Service*, 459 U.S. 212, 225 (1983). The interest in interpretive uniformity and predictability that require that labor contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniformed federal law, *whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort*. Any other result would alleviate form over substance and allow plaintiffs to evade the requirements of Section 301 by relabeling their contract claims as claims for tortious breach of contract.
>
> Where state law is allowed to determine the meaning intended by the parties in adopting a particular contract phrase or term, all the evils addressed in *Lucas Flower* would recur. 85 L.Ed.2d 206 (emphasis added).

In *Bale* v. *General Telephone of California*, 795 F.2d 775 (9th Cir. 1986), the Court held that former employees' state-law fraud and negligent misrepresentation claims against the employer were preempted by § 301; where adjudication of the tort claims would require reference to, and interpretation of the labor contract. In the instant action, Petitioner's claims are similar to those in *Bale*.

Petitioner contends the Sixth Circuit decision in this matter conflicts with *Lingle* and decisions from the Third and Fifth Circuits. In support of this contention, Petitioner relies upon the case of *Berda* v. *CBS, Inc.*, 881 F.2d 20 (3rd Cir. 1989). In *Berda*, the Court was faced with the question:

> Whether state contract and tort claims for monetary relief brought by a bargaining unit employee against his employer based upon *alleged misrepresentations of job security, made before the employee became a member of the bargaining unit which confer additional rights to those afforded by the collective bargaining agreement*, are preempted by section 301 of the Labor Management Relations Act, . . . (Emphasis added).

The *Berda* plaintiff brought suit against his former employer asserting two contract claims; breach of an individual employment contract and promissory estoppel, and two tort claims of fraud and negligent misrepresentation. All of the claims were founded upon Pennsylvania law and the plaintiff sought only monetary relief. The defendant employer contended the plaintiffs' claims were preempted by § 301. The district court held the plaintiffs' claims were preempted by § 301; and plaintiffs could not maintain suit under 29 U.S.C. § 185 because plaintiffs had not filed their claim

within the six-month statute of limitations period set forth in *DelCostello* v. *Teamsters*, 462 U.S. 151; 103 S.Ct. 2281; 76 L.Ed.2d 476 (1983).

The Third Circuit Court of Appeals recognized the holding set forth in *Allis-Chalmers, supra*, stating § 301 preemption extended not only to contract claims but to claims sounding in tort. Quoting *Allis-Chalmers*; the Third Circuit stated:

> When resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, the claim must either be treated as a 301 claim . . . or dismissed as pre-empted by federal labor-contract law. *Allis-Chalmers*, at 202.

Recognizing *Lingle*, the Third Circuit found the state tort claims, asserted by the plaintiff in *Berda*, were substantially different and independent from any rights created by the Collective Bargaining Agreement. Petitioner's claims herein are clearly distinguishable. In *Berda*, the plaintiff attempted to seek compensation for pre-employment representations made to him by the defendant employer; asserting resolution of those claims did not require interpretation of the plaintiff's post-employment collective bargaining agreement. Relying on similar facts set forth in *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386; 107 S.Ct. 2425; 96 L.Ed.2d 318 (1987), the Third Circuit stated:

> In *Caterpillar*, the Supreme Court held that claims of *pre-existing* employment contracts were not preempted by Section 301.

The *Caterpillar* decision stated "individual employment contracts are not inevitably superceded by any subsequent collective agreement covering an individual

employee, and claims based upon them may arise under state law." *Caterpillar*, 107 S.Ct. at 2431. *Caterpillar* explained that the employer's basic error in contending § 301 preemption arose due to the defendant employer's "failure to recognize that an employee, covered by a collective-bargaining agreement, is permitted to assert *legal rights independent of that agreement*, including state-law contract rights, *so long as the contract relied upon is not a collective-bargaining agreement.*" *Caterpillar*, 107 S.Ct. at 2431-32. This Court cautioned plaintiffs had a right to bring a state contract claim, because their "complaint is *not* substantially dependent upon interpretation of the collective-bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective bargaining agreement." *Caterpillar*, 107 S.Ct. at 2431 (emphasis added).

In the case at hand, Petitioner sought to enforce rights he had pursuant to the provisions of the Collective Bargaining Agreement. Specifically, Plaintiff sought reinstatement to his employment position as a bus driver with GREYHOUND, when the Petitioner was medically disabled from performing his duties as a bus driver for GREYHOUND. In the instant case, it is clear that the Petitioner's right to reinstatement, as well as GREYHOUND's rights in determining whether or not Petitioner had recovered from his disability, to allow reinstatement, clearly involved interpretation of the Collective Bargaining Agreement. Petitioner's state law claim of fraud arose out of a common nucleus of operative facts which were *directly related to and dependent upon the interpretation of the labor contract*, and the rights of the Petitioner and the Respondents. The purported fraud arose out of GREYHOUND's refusal to return Petitioner to his former position as a bus driver *under the labor contract*. Moreover, the jury and the

trial court, contrary to law, determined GREYHOUND *was contractually required to furnish the Union with a copy of Dr. Kantor's second medical report.* Based on the labor contract, GREYHOUND asserted the language of the labor contract did not obligate it to furnish a copy of the report unless the report was requested by the Union. Clearly, this issue alone required interpretation of the labor contract language. The pertinent provision being stated in Section N, Article 2(m):

> The company will permit an employee or his representative, *upon request*, to either copy or check the service record and medical examination reports. Upon request, the Company will furnish the Union copies of said service record and medical examination reports, where the Company has a copying machine readily available and such record are not voluminous. (Emphasis added).

Interpretation of the above-referenced provision was not a matter for the Court, or the jury, but for the grievance procedure or ultimately an arbitrator pursuant to the Collective Bargaining Agreement. Failure to furnish this report was the basis of Petitioner's state fraud claim.

Petitioner has argued that the Sixth Circuit Court of Appeals' decision herein conflicts with the holding set forth in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), contending that the analysis and facts set forth in *Wells* is similar to the instant matter.

In *Wells*, 32 plaintiffs brought suit in federal district court alleging that the defendant employer had fraudulently misrepresented to the employees their future rights concerning rehire when said employees opted to accept severance pay pursuant to a contract negotiated

between the employer and the employees' union in the face of lay-offs at one of the employer's plants. When said plaintiffs sought to apply for new positions opening up at the defendant employer's plant, said employees were allegedly informed by management that because they had chosen the severance pay plan they were ineligible for rehire.

As a defense to the plaintiffs' suit, the defendant employer raised two defenses. First, the employer contended that plaintiffs' claims should be dismissed for lack of subject matter jurisdiction; when same was properly vested with the National Labor Relations Board. Alternatively, defendant employer asserted plaintiffs' claims were preempted by § 301 of the Labor-Management Relations Act and § 514(a) of the Employee Retirement Income Security Act of 1974.

On appeal, the Fifth Circuit held the district court, not the NLRB, had subject matter jurisdiction over the plaintiffs' suit. In addressing the defendant's preemption argument, the Fifth Circuit held the defendant employer's argument, with respect to preemption, was flawed in two respects. First, § 301 preemption applied when resolution of the particular dispute is "substantially dependent upon analysis of the terms" of the collective bargaining agreement; not whenever a collectively-bargained agreement becomes relevant to a dispute. Secondly, the Fifth Circuit found the defendant employer's argument rested upon an unsound premise: namely, that the plaintiffs' claims the employer's representatives fraudulently misrepresented *what was in the contract*. Instead, the Fifth Circuit held the plaintiffs were asserting that the defendant employer had fraudulently induced individual employees to opt for the severance pay plan by making *an extraneous promise concerning* their future employment eligibility. Said

plaintiffs did not claim that the promise had anything to do with the contents of the bargained for severance pay plan.

In ultimately holding the plaintiffs' claims in *Wells* were not preempted by § 301, the Court stated:

> We recognize, as have other Circuits, that the existence of an agreement nevertheless may invoke section 301 preemption where a court determines that the agreement contains provisions that might reasonably be construed as governing the disputed matter. The agreement might, for example, contain provisions that are contrary to the representations made, or might reserve the particular issue for future collective bargaining or preclude such inducements on the part of the employer representatives. Under such circumstances, interpretation of the collective bargaining agreement, in the sense of construction and application of these provisions, would be required, and federal law would properly govern. But this is not the case here.

In the case at hand, it is clear that various provisions of the Collective Bargaining Agreement *had to be interpreted* for a resolution of the dispute between the Petitioner and the Respondents herein. In the case at hand, Petitioner sought to enforce reinstatement rights which were afforded to him only by the terms and conditions of the Collective Bargaining Agreement. There was no extraneous promise, as in *Wells*. Further, the Collective Bargaining Agreement established the procedures, rights, and duties of the parties; when Petitioner sought to invoke his reinstatement rights under the Collective Bargaining Agreement. The jury and later the trial court, erroneously determined that the Respondents had a duty, pursuant to the Collective Bargaining Agree-

ment, to provide the Petitioner's Union a copy of the second Dr. Kantor report. A provision of the Collective Bargaining Agreement specifically stated an employee's or Union's right to see or copy medical examinations, among other things, from an employee's employment file, stemmed from provisions contained in the Collective Bargaining Agreement. Lastly, the trial court erroneously submitted to the jury, a question of law, with respect to whether or not the Petitioner was obligated to pursue his contractual grievance and arbitration remedies. This specific question was set forth on a special verdict form submitted to the jury and clearly evidences that the jury was required to interpret provisions of the Collective Bargaining Agreement, as well as determine, as a matter of law, whether the Petitioner was required to follow the remedial provisions set forth in said Agreement.

Thus, it is clear that the claims asserted herein by the Petitioner were inextricably intertwined with interpretation of the Collective Bargaining Agreement. In other words, Petitioner's state law fraud claims were "substantially dependent upon interpretation of the Collective Bargaining Agreement," and therefore were preempted by § 301. The Sixth Circuit correctly ruled that the trial court committed reversible error in submitting this matter to the jury for its consideration. As a matter of law, Defendants were entitled to a dismissal of Petitioner's state law claims as same were preempted by § 301 and were not filed within the six-month statute of limitations. *DelCastello* v. *International Brotherhood of Teamsters, supra; United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56; 102 S.Ct. 1559; 67 L.Ed.2d 732 (1981); *Stallcop* v. *Kaiser Foundation Hosp.*, 820 F.2d 1044 (9th Cir. 1987).

In *Stallcop* v. *Kaiser Foundation Hosp., supra,* plaintiff brought a cause of action for fraud based upon representations made by his employer in connection with a reinstatement agreement. The court held, the fraud action depended upon an interpretation of the collective bargaining agreement, and was preempted by § 301, citing *Bale* v. *General Telephone of California, supra* at 779-80, and *Fristoe* v. *Reynolds Metals Co.*, 615 F.2d 1209, 1211-12 (9th Cir. 1980). The court further held that the six month statute of limitation under *Del-Costello* applied to time-bar plaintiff's claim. Petitioner's case here is on "all fours" with the decision in *Stallcop.*

In essence, Petitioner is arguing that GREYHOUND acted in bad faith and violated the provisions of the Collective Bargaining Agreement; thereby failing to abide by the terms of the Agreement when it negotiated with the Union for an examination by a third physician. In resolving this matter on appeal, the Sixth Circuit addressed the Petitioner's contention that the second physical report of Dr. Kantor was intentionally withheld by GREYHOUND representatives. According to Petitioner, but for such withholding, the examination by the third doctor, Dr. Breneman, would not have occurred.

In reviewing these arguments, the Sixth Circuit viewed the facts in a light most favorable to the Petitioner and assumed Dr. Kantor's second physical report was intentionally withheld by GREYHOUND. The Court found evidence to support the disqualifications of the Petitioner, GREYHOUND's higher internal standards; finding, in fact, the two physicians had disagreed as to Petitioners ability to return to work. The Court stated any analysis regarding GREYHOUND's internal standards was "uniquely a contractual question . . . to be

resolved in the first instance by the arbitration process specified in the agreement. (Petitioner's Appendix F, App. 28 fn. 7).

Thus, the rights Petitioner sought to vindicate in the District Court arose solely pursuant to the terms of the Collective Bargaining Agreement, as the Sixth Circuit correctly found. The Sixth Circuit found the rights sought to be enforced by the Petitioner, with respect to his reinstatement to employment, were created by the Collective Bargaining Agreement and provided the only basis for the relationship between the Petitioner and the Respondent herein as employee and employer. Thus, it is clear that resolution of the Petitioner's state-law claim directly required interpretation of the terms of the Collective Bargaining Agreement itself. The rights sought to be enforced and the relationship between the parties were created not by state law, but by the Collective Bargaining Agreement.

II.

PETITIONER'S CAUSE OF ACTION WAS BARRED BY HIS FAILURE TO INITIATE AND EXHAUST ALL AVAILABLE REMEDIES PURSUANT TO THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT.

In *Vaca* v. *Sipes*, 386 U.S. 171; 87 S.Ct. 903; 17 L.Ed. 842 (1967), this Honorable Court stated Congress clearly signaled its intent that bargained-for grievance procedures should be enforced. Section 302(d) of the Labor-Management Relations Act states that "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes." 61 Stat. 153, 29 U.S.C. § 173(d) (June 23, 1947). In *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650; 85 S.Ct. 614; 13 L.Ed.2d 580 (1965), this Honorable Court held before a § 301 action can be initiated,

an employee must attempt to use the procedures available under the collective bargaining agreement. These holdings were reaffirmed in *Clayton* v. *International Union, United Automobile, Aerospace & Agricultural Workers of America*, 451 U.S. 679; 101 S.Ct. 2088; 68 L.Ed.2d 538 (1981), where this Honorable Court held that *Republic Steel* was intended to protect the collective bargaining process, encouraging private rather than judicial resolution of disputes involving interpretation or application of a collective bargaining agreement.

The provisions of the Collective Bargaining Agreement were agreed to by the Union, Petitioner's exclusive representative, under §§ 9 and 301, 29 U.S.C. 159 and 185, as the terms and conditions of his employment. They must be afforded their intended affect to limit Petitioner's enforcement of rights arising from, or within the ambit of the Collective Bargaining Agreement. Even the trial court acknowledged that "obviously, if he should have gone to arbitration, the statute has run, you don't have to argue that."

In the instant case, it was stipulated by Petitioner's counsel and admitted by the Petitioner himself, that he did not file a grievance to resolve the dispute as to his qualifications to return to work. Although Petitioner wrote a letter to the Union stating he was submitting to the physical exam, by Dr. Breneman at Henry Ford Hospital, under protest, the letter was not enough to evidence compliance with the grievance procedures. *Moore* v. *General Motors Corp., supra*; *Republic Steel* v. *Maddox, supra*; *United Paper-Works* v. *Georgia Pacific*, 798 F.2d 172 (6th Cir. 1986).

In *United Paper-Works, supra*, the Sixth Circuit reaffirmed the well-established rule which requires a plaintiff to exhaust his grievance procedure remedies prior to filing suit. In its opinion, the Court empha-

sized that whether an employer has violated the contract is a question for an arbitrator and not for a court to determine.

In *A T&T Technologies, Inc.* v. *Communication Workers*, 475 U.S. 643; 106 S.Ct. 1415; 89 L.Ed.2d 648 (1986), this Honorable Court held that a court's role is very limited. Where matters arguably are under the collective bargaining agreement, the court should only decide whether a matter is subject to the labor contract. If it is, the matter should go through the grievance and arbitration procedure to be ruled upon by an arbitrator.

In *United Steel Workers of America* v. *Warrior & Golf Navigation Co.*, 363 U.S. 574; 80 S.Ct. 1347; 4 L.Ed.2d 1409 (1960), this Honorable Court made it clear that a party opposing grievance and arbitration procedures must have unequivocal evidence that the dispute was not intended to be arbitrated. In the instant case, Plaintiff has never contended this matter was not arbitrable. The alleged fraud *never* prevented arbitration. The clear, unrebutted testimony of the Director of Industrial Relations was the Petitioner's claim was subject to the grievance and arbitration procedure.

In *Greyhound Lines, Inc.*, 53 L.A. 464 (Lennard 1969,) the arbitrator held that a disqualified driver's remedy is to apply for medical arbitration and that he may seek medical arbitration as many times as reasonable "where it appears that [his] health and capabilities have improved substantially." In that case, employee X was certified by his family physician to return to work. The company doctors, however, disagreed and recommended against his continued employment as a bus driver. As a result, the medical arbitration process was expedited and a third impartial doctor was appointed to make a medical determination as to the plaintiff's fitness to be a bus driver. Like the Petitioner here, employee X had

been diagnosed as having heart problems since 1967. The impartial doctor examined employee X in January of 1968, one year later, and found that:

> "... Since I feel that his past myocardial infarction, the appearance of his electrocardiogram, and his markedly elevated serum cholesterol indicate a small but definite risk that his heart disease would interfere with safe driving of a motor carrier." 53 L.A. 465.

The facts of employee X's case are similar to those of the Petitioner herein. Here, as in employee X's case, Petitioner should have sought contract interpretation arbitration within 30 days of receipt of the notice of the medical arbitrator's opinion. The 30-day requirement is set out in Section 1, N Article 3.(b), of the labor contract.

Also, like employee X, Petitioner could have availed himself of additional medical arbitrations. Petitioner and the Union testified that Petitioner never filed any grievance or fully pursued additional medical arbitrations. Since Petitioner's fraud claim arises out of the administration of the Collective Bargaining Agreement language, the interpretation of the contract is controlling. This can only be done by the contract interpretation and arbitration proceedings contained in the Collective Bargaining Agreement. *United Steel Workers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S 593; 80 S.Ct. 1358; 4 L.Ed.2d 1454 (1960); *United Steel Workers of America* v. *Warrior & Golf, supra*; *United Steel Workers of America* v. *American Manufacturing Co.*, 363 U.S. 564; 80 S.Ct. 1343; 4 L.Ed.2d 1403 (1960).

Any alleged fraud by the Respondents was not in violation of the labor contract, inasmuch as the third doctor independently addressed the issue of whether or

not Petitioner was able to resume his employment as a bus driver because of his heart. Further, the Sixth Circuit correctly noted that even assuming *arguendo*, but not *conceding* that GREYHOUND intentionally and fraudulently withheld Dr. Kantor's second report; Dr. Kantor's first report indicated that the Petitioner was not able to return to work due to his vision, and Petitioner did not meet GREYHOUND's internal standards. Thus, viewing the facts in the light most favorable to the Petitioner, the alleged fraud, even if true, would not have prevented the arbitration process from resolving the matter.

The medical examination clause of the Collective Bargaining Agreement was never meant for jury interpretation. Questions regarding the interpretation of labor contract language are to be handled by the Company and the Union; either by mutual agreement or through the grievance procedure which included a specific step to resolve interpretation matters prior to resorting to labor arbitration. Petitioner never explained why he did not insist that a grievance be filed, or why he did not file a grievance himself in accordance with Section N, Article 3 of the Collective Bargaining Agreement.

Pursuant to *Dill* v. *Greyhound Corp.*, 435 F.2d 231, 237 (6th Cir. 1971), the trial court should have ruled, as a matter of law, that Petitioner had to arbitrate the dispute. Instead, the jury was asked to consider, over Respondents' objections, whether it would have been futile for Petitioner to pursue the grievance procedure. Here, the trial court conceded "there is no evidence of futility, so let's don't argue that." Moreover, the trial court did not understand application of the futility concept in a labor sense. Nonetheless, despite the trial court's own confusion, the special verdict form asked

the jury to determine whether Petitioner should have filed a grievance.

The concept of futility pertains to the issue of exhaustion of intra-union remedies, under the union constitution and bylaws. *Vaca* v. *Sipes, supra,* at 185; *Bshara* v. *Eltra Corp. & UAW,* 394 F.2d 502 (6th Cir. 1968); *Bagsby* v. *Lewis Brothers, Inc.,* 820 F.2d 799 (6th Cir. 1987). The jury considered futility in the context of the grievance procedure, as opposed to its proper context which is an issue that may be raised as a defense for failure to exhaust intra-union remedies. *Republic Steel* v. *Maddox, supra,* is the landmark case which clearly enunciates the general rule that an employee is bound by the terms of a collective bargaining agreement and must attempt to exhaust the exclusive grievance in arbitration procedures established by that agreement. An exception to that general rule is an employer's repudiation of the grievance procedure; and not futility of pursuing a breach of duty of fair representation claim against the Union under its constitution and bylaws. *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, et. al.,* 391 U.S. 418 88 S.Ct. 1717; 20 L.Ed.2d 706 (1968). The repudiation exception does not apply in the instant case inasmuch as there was *no* evidence presented to show GREYHOUND repudiated the contractual grievance procedure. Moreover, Petitioner *never* filed a grievance.

CONCLUSION

The Sixth Circuit Court of Appeals was correct in ruling Petitioner's state law fraud claim was clearly preempted by § 301 of the Labor-Management Relations Act.

RELIEF REQUESTED

WHEREFORE, Respondents, GREYHOUND LINES, INC., and JAMES SELBY, respectfully pray this Honorable Court deny the Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.

By: /s/ RONALD G. ACHO (P-23913)
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Dated: January 24, 1990

RESPONDENTS' APPENDIX

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MARCH 14, 1971 BULLETIN FROM SAFETY DEPARTMENT, GREYHOUND LINES, INC.

"Disqualification on Drivers Suffering Heart Attacks"

1) An employee was required to present a recommendation from his personal physician indicating he was physically qualified to perform all of the duties required of the driver. If possible, *prior to the issuance of this statement,* the personal physician should be contacted by the company doctor, who should explain the DOT requirements, Section 391. 41(b)(4), that a driver have no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse or congestive cardiac failure. *Also, he should point out the physical and nervous strain in driving a commercial vehicle,* our obligation to the safety of our passengers, the necessity of lifting and carrying package express and baggage weighing up to 100 pounds, and the changing of tires weighing approximately 200 pounds, along with the other irritations that arise with unruly passengers, et cetera.

2) If the personal physician still approves the driver for return to work, *contact the Safety Department* immediately for further instructions *before* sending him to the company doctor.

3) *Following disqualification by the Company doctor, nothing further is to be done unless the employee files a grievance for medical arbitration with the*

Union. In that event, the selection of the third doctor as provided by the Labor Contract is to be followed.

4) Upon selection of the third doctor, arrange for the Company doctor to consult with him in the same manner as stated in the note under Item (1). In addition, you are to personally consult with the third doctor to emphasize the strenuous nature of the duties of a driver and to stress the company's feelings that a man who has suffered a heart attack jeopardizes the safety of our passengers and, therefore does not meet the physical requirements of the DOT Safety Regulations, Section 391.41(b)(4), Physical Qualifications for Drivers. (Emphasis added).

In every instance where it becomes known that a driver has suffered a heart attack, the Safety Department is to be notified without delay. *W. D. Weiss.*